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mined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment—again, always regarded as an option by the political branches—any more than courts may consider whether to comply with any other species of domestic law. This result would be particularly anomalous in light of the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918).

The ICJ Statute, incorporated into the U. N. Charter, provides further evidence that the ICJ's judgment in *Avena* does not automatically constitute federal law judicially enforceable in United States courts. Art. 59, 59 Stat. 1062. To begin with, the ICJ's "principal purpose" is said to be to "arbitrate particular disputes between national governments." *Sanchez-Llamas*, *supra*, at 355 (citing 59 Stat. 1055). Accordingly, the ICJ can hear disputes only between nations, not individuals. Art. 34(1), 59 Stat. 1059 ("Only states [*i.e.*, countries] may be parties in cases before the [ICJ]"). More important, Article 59 of the statute provides that "[t]he decision of the [ICJ] has *no binding force* except between the parties and in respect of that particular case." *Id.*, at 1062 (emphasis added).[7] The

[7]Medellín alters this language in his brief to provide that the ICJ Statute makes the *Avena* judgment binding "in respect of [his] particular case." Brief for Petitioner 22 (internal quotation marks omitted). Medellín does not and cannot have a case before the ICJ under the terms of the ICJ Statute.

dissent does not explain how Medellín, an individual, can be a party to the ICJ proceeding.

Medellín argues that because the *Avena* case involves him, it is clear that he—and the 50 other Mexican nationals named in the *Avena* decision—should be regarded as parties to the *Avena* judgment. Brief for Petitioner 21–22. But cases before the ICJ are often precipitated by disputes involving particular persons or entities, disputes that a nation elects to take up as its own. See, *e.g.*, *Case Concerning the Barcelona Traction, Light & Power Co.* (*Belg. v. Spain*), 1970 I. C. J. 3 (Judgment of Feb. 5) (claim brought by Belgium on behalf of Belgian nationals and shareholders); *Case Concerning the Protection of French Nationals and Protected Persons in Egypt* (*Fr. v. Egypt*), 1950 I. C. J. 59 (Order of Mar. 29) (claim brought by France on behalf of French nationals and protected persons in Egypt); *Anglo-Iranian Oil Co. Case* (*U. K. v. Iran*), 1952 I. C. J. 93, 112 (Judgment of July 22) (claim brought by the United Kingdom on behalf of the Anglo-Iranian Oil Company). That has never been understood to alter the express and established rules that only nation-states may be parties before the ICJ, Art. 34, 59 Stat. 1059, and—contrary to the position of the dissent, *post*, at 23—that ICJ judgments are binding only between those parties, Art. 59, *id.*, at 1062.[8]

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[8]The dissent concludes that the ICJ judgment is binding federal law based in large part on its belief that the Vienna Convention overrides contrary state procedural rules. See *post*, at 19–20, 20–21, 23. But not even Medellín relies on the Convention. See Reply Brief for Petitioner 5 (disclaiming reliance). For good reason: Such reliance is foreclosed by the decision of this Court in *Sanchez-Llamas*, 548 U. S., at 351 (holding that the Convention does not preclude the application of state procedural bars); see also *id.*, at 363 (GINSBURG, J., concurring in judgment). There is no basis for relitigating the issue. Further, to rely on the Convention would elide the distinction between a treaty—negotiated by the President and signed by Congress—and a judgment rendered pursuant to those treaties.

It is, moreover, well settled that the United States' interpretation of a treaty "is entitled to great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982); see also *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 168 (1999). The Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law. See Brief for United States as *Amicus Curiae* 4, 27–29.[9]

The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own." *Sanchez-Llamas*, 548 U. S., at 347.

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[9] In interpreting our treaty obligations, we also consider the views of the ICJ itself, "giv[ing] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [the treaty]." *Breard* v *Greene*, 523 U. S. 371, 375 (1998) (*per curiam*); see *Sanchez-Llamas*, *supra*, at 355–356. It is not clear whether that principle would apply when the question is the binding force of ICJ judgments themselves, rather than the substantive scope of a treaty the ICJ must interpret in resolving disputes. Cf. *Phillips Petroleum Co* v *Shutts*, 472 U. S. 797, 805 (1985) ("[A] court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment"), 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4405, p. 82 (2d ed. 2002) ("The first court does not get to dictate to other courts the preclusion consequences of its own judgment"). In any event, nothing suggests that the ICJ views its judgments as automatically enforceable in the domestic courts of signatory nations. The *Avena* judgment itself directs the United States to provide review and reconsideration of the affected convictions and sentences "*by means of its own choosing*." 2004 I. C. J., at 72 (emphasis added). This language, as well as the ICJ's mere suggestion that the "judicial process" is best suited to provide such review, *id.*, at 65–66, confirm that domestic enforceability in court is not part and parcel of an ICJ judgment.

B

The dissent faults our analysis because it "looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)." *Post*, at 26. Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue. That is after all what the Senate looks to in deciding whether to approve the treaty.

The interpretive approach employed by the Court today—resorting to the text—is hardly novel. In two early cases involving an 1819 land-grant treaty between Spain and the United States, Chief Justice Marshall found the language of the treaty dispositive. In *Foster*, after distinguishing between self-executing treaties (those "equivalent to an act of the legislature") and non-self-executing treaties (those "the legislature must execute"), Chief Justice Marshall held that the 1819 treaty was non-self-executing. 2 Pet., at 314. Four years later, the Supreme Court considered another claim under the same treaty, but concluded that the treaty was self-executing. See *Percheman*, 7 Pet., at 87. The reason was not because the treaty was sometimes self-executing and sometimes not, but because "the language of" the Spanish translation (brought to the Court's attention for the first time) indicated the parties' intent to ratify and confirm the land-grant "by force of the instrument itself." *Id*, at 89.

As against this time-honored textual approach, the dissent proposes a multifactor, judgment-by-judgment analysis that would "jettiso[n] relative predictability for the open-ended rough-and-tumble of factors." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 547 (1995). The dissent's novel approach to deciding which (or, more accurately, when) treaties give rise to

directly enforceable federal law is arrestingly indeterminate. Treaty language is barely probative. *Post*, at 12–13 ("[T]he absence or presence of language in a treaty about a provision's self-execution proves nothing at all"). Determining whether treaties themselves create federal law is sometimes committed to the political branches and sometimes to the judiciary. *Post*, at 13. Of those committed to the judiciary, the courts pick and choose which shall be binding United States law—trumping not only state but other federal law as well—and which shall not. *Post*, at 13–27. They do this on the basis of a multifactor, "context-specific" inquiry. *Post*, at 13. Even then, the same treaty sometimes gives rise to United States law and sometimes does not, again depending on an ad hoc judicial assessment. *Post*, at 13–27.

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. U. S. Const., Art. I, §7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, §2. The dissent's understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.

The dissent's approach risks the United States' involvement in international agreements. It is hard to believe that the United States would enter into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary. Senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United States' efforts to

negotiate and sign international agreements.

In this case, the dissent—for a grab bag of no less than seven reasons—would tell us that this *particular* ICJ judgment is federal law. *Post*, at 13–27. That is no sort of guidance. Nor is it any answer to say that the federal courts will diligently police international agreements and enforce the decisions of international tribunals only when they *should be* enforced. *Ibid.* The point of a non-self-executing treaty is that it "addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court." *Foster*, *supra*, at 314 (emphasis added); *Whitney*, 124 U. S., at 195. See also *Foster*, *supra*, at 307 ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided"). The dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.

C

Our conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the "postratification understanding" of signatory nations. See *Zicherman*, 516 U. S., at 226. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellin nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts.[10] In deter-

[10]The best that the ICJ experts as *amici curiae* can come up with is the contention that local Moroccan courts have referred to ICJ judgments as "dispositive." Brief for ICJ Experts as *Amici Curiae* 20, n. 31. Even the ICJ experts do not cite a case so holding, and Moroccan

mining that the Vienna Convention did not require certain relief in United States courts in *Sanchez-Llamas*, we found it pertinent that the requested relief would not be available under the treaty in any other signatory country. See 548 U. S., at 343–344, and n. 3. So too here the lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts.

Our conclusion is further supported by general principles of interpretation. To begin with, we reiterated in *Sanchez-Llamas* what we held in *Breard*, that "'absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.'" 548 U. S., at 351 (quoting *Breard*, 523 U. S., at 375). Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement in the Optional Protocol, the U. N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.

Moreover, the consequences of Medellín's argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment

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practice is at best inconsistent, for at least one local Moroccan court has held that ICJ judgments are not binding as a matter of municipal law. See, e.g., *Mackay Radio & Tel. Co.* v. *Lal-La Fatma Bent si Mohamed el Khadar*, [1954] 21 Int'l L. Rep. 136 (Tangier, Ct. App. Int'l Trib.) (holding that ICJ decisions are not binding on Morocco's domestic courts), see also *"Socobel"* v. *Greek State*, [1951] 18 Int'l L. Rep. 3 (Belg., Trib. Civ. de Bruxelles) (holding that judgments of the ICJ's predecessor, the Permanent Court of International Justice, were not domestically enforceable)

and quarrel with its reasoning or result. (We already know, from *Sanchez-Llamas*, that this Court disagrees with both the reasoning and result in *Avena*.) Medellín's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate. See, *e.g.*, *Cook* v. *United States*, 288 U. S. 102, 119 (1933) (later-in-time self-executing treaty supersedes a federal statue if there is a conflict). And there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ. Indeed, that is precisely the relief Mexico requested. *Avena*, 2004 I. C. J., at 58–59.

Even the dissent flinches at reading the relevant treaties to give rise to self-executing ICJ judgments in all cases. It admits that "Congress is unlikely to authorize automatic judicial enforceability of *all* ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches." *Post*, at 24. Our point precisely. But the lesson to draw from that insight is hardly that the judiciary should decide which judgments are politically sensitive and which are not.

In short, and as we observed in *Sanchez-Llamas*, "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." 548 U. S., at 354 Given that holding, it is difficult to see how that same structure and purpose can establish, as Medellín argues, that *judgments* of the ICJ nonetheless were intended to be conclusive on our courts. A judgment is binding only if there is a rule of law that makes it so. And the question whether ICJ judgments can bind domestic courts depends upon the same analysis undertaken in *Sanchez-Llamas* and set forth above.

Our prior decisions identified by the dissent as holding a number of treaties to be self-executing, see *post*, at 8–9,

Appendix A, stand only for the unremarkable proposition that some international agreements are self-executing and others are not. It is well settled that the "[i]nterpretation of [a treaty] . . . must, of course, begin with the language of the Treaty itself." *Sumitomo Shoji America, Inc.*, 457 U. S., at 180. As a result, we have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.

Medellín and the dissent cite *Comegys* v. *Vasse*, 1 Pet. 193 (1828), for the proposition that the judgments of international tribunals are automatically binding on domestic courts. See *post*, at 9; Reply Brief for Petitioner 2; Brief for Petitioner 19–20. That case, of course, involved a different treaty than the ones at issue here; it stands only for the modest principle that the terms of a treaty control the outcome of a case.[11] We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U. N. Charter, the Optional Protocol, and the ICJ Statute do not do so. And whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide. See *Sanchez-Llamas*, *supra*, at 353–354.

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[11] The other case Medellín cites for the proposition that the judgments of international courts are binding, *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899), and the cases he cites for the proposition that this Court has routinely enforced treaties under which foreign nationals have asserted rights, similarly stand only for the principle that the terms of a treaty govern its enforcement. See Reply Brief for Petitioner 4, 5, n. 2. In each case, this Court first interpreted the treaty prior to finding it domestically enforceable. See, *e.g.*, *United States* v. *Rauscher*, 119 U. S. 407, 422–423 (1886) (holding that the treaty required extradition only for specified offenses); *Hopkirk* v. *Bell*, 3 Cranch 454, 458 (1806) (holding that the treaty of peace between Great Britain and the United States prevented the operation of a state statute of limitations on British debts).

D

Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with Medellín that, as a general matter, "an agreement to abide by the result" of an international adjudication—or what he really means, an agreement to give the result of such adjudication domestic legal effect—can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. See Brief for Petitioner 20. The point is that the particular treaty obligations on which Medellín relies do not of their own force create domestic law

The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. See *post*, at 4, 16–17. Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is "useless." See *post*, at 17; cf. *post*, at 11 (describing the British system in which treaties "virtually always requir[e] parliamentary legislation"). Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. See *Head Money Cases*, 112 U. S., at 598. And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent, *post*, at 24) through implementing legislation, as it regularly has. See, *e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277, div. G, §2242, 112 Stat. 2681–822, note following 8 U. S. C. §1231 (directing the "appropriate agencies" to "prescribe regulations to implement the obligations of the United States under Article 3" of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment);

see also *infra*, at 25–26 (listing examples of legislation implementing international obligations).

Further, that an ICJ judgment may not be automatically enforceable in domestic courts does not mean the particular underlying treaty is not. Indeed, we have held that a number of the "Friendship, Commerce, and Navigation" Treaties cited by the dissent, see *post*, Appendix B, are self-executing—based on "the language of the[se] Treat[ies]." See *Sumitomo Shoji America, Inc.*, *supra*, at 180, 189–190. In *Kolovrat* v. *Oregon*, 366 U. S. 187, 191, 196 (1961), for example, the Court found that Yugoslavian claimants denied inheritance under Oregon law were entitled to inherit personal property pursuant to an 1881 Treaty of Friendship, Navigation, and Commerce between the United States and Serbia. See also *Clark* v. *Allen*, 331 U. S. 503, 507–511, 517–518 (1947) (finding that the right to inherit real property granted German aliens under the Treaty of Friendship, Commerce, and Consular Rights with Germany prevailed over California law). Contrary to the dissent's suggestion, see *post*, at 11, neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words; that is a caricature of the Court's opinion. Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.

In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. Cf. *post*, at 24 (BREYER, J., dissenting). The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. See, *e.g.*, 22 U. S. C. §1650a(a) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [Convention on the Settlement of Investment Disputes] shall create a right arising under a treaty of the United States. The pecuniary obliga-

tions imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States"); 9 U. S C. §§201–208 ("The [U. N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter," §201). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.[12]

Further, Medellín frames his argument as though giving the *Avena* judgment binding effect in domestic courts simply conforms to the proposition that domestic courts generally give effect to foreign judgments. But Medellín does not ask us to enforce a foreign-court judgment settling a typical commercial or property dispute. See, *e.g.*, *Hilton* v *Guyot*, 159 U. S. 113 (1895); *United States* v. *Arredondo*, 6 Pet. 691 (1832); see also Uniform Foreign Money-Judgments Recognition Act §1(2), 13 U. L. A., pt. 2, p. 44 (2002) ("'[F]oreign judgment' means any judgment of a foreign state granting or denying recovery of a sum of money"). Rather, Medellín argues that the *Avena* judgment has the effect of enjoining the operation of state law. What is more, on Medellín's view, the judgment would force the State to take action to "review and reconside[r]"

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[12] That this Court has rarely had occasion to find a treaty non-self-executing is not all that surprising. See *post*, at 8 (BREYER, J., dissenting). To begin with, the Courts of Appeals have regularly done so. See, *e.g.*, *Pierre* v. *Gonzales*, 502 F. 3d 109, 119–120 (CA2 2007) (holding that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is non-self-executing); *Singh* v. *Ashcroft*, 398 F 3d 396, 404, n. 8 (CA6 2005) (same); *Beazley* v. *Johnson*, 242 F 3d 248, 267 (CA5 2001) (holding that the International Covenant on Civil and Political Rights is non-self-executing). Further, as noted, Congress has not hesitated to pass implementing legislation for treaties that in its view require such legislation.

his case. The general rule, however, is that judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign States, "are not generally entitled to enforcement." See 2 Restatement §481, Comment *b*, at 595.

In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions. As we noted in *Sanchez-Llamas*, a contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules. See 548 U. S., at 360. Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections." *Ibid.*

III

Medellín next argues that the ICJ's judgment in *Avena* is binding on state courts by virtue of the President's February 28, 2005 Memorandum. The United States contends that while the *Avena* judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power "to establish binding rules of decision that preempt contrary state law." Brief for United States as *Amicus Curiae* 5. Accordingly, we must decide whether the President's declaration alters our conclusion that the *Avena* judgment is not a rule of

domestic law binding in state and federal courts.[13]

A

The United States maintains that the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and "to do so expeditiously." Brief for United States as *Amicus Curiae* 11, 12. We do not question these propositions. See, *e.g.*, *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759, 767 (1972) (plurality opinion) (The President has "the lead role . . . in foreign policy"); *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414 (2003) (Article II of the Constitution places with the President the "'vast share of responsibility for the conduct of our foreign relations'" (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring)). In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Such considerations, however, do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself." *Youngstown*, *supra*, at 585; *Dames & Moore* v. *Regan*, 453 U. S. 654, 668 (1981).

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[13] The dissent refrains from deciding the issue, but finds it "difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law." *Post*, at 29. We agree. The questions here are the far more limited ones of whether he may unilaterally create federal law by giving effect to the judgment of this international tribunal pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case. Those are the only questions we decide

Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*, at 637. In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." *Ibid.* Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.*, at 637–638.

B

The United States marshals two principal arguments in favor of the President's authority "to establish binding rules of decision that preempt contrary state law." Brief for United States as *Amicus Curiae* 5. The Solicitor General first argues that the relevant treaties give the President the authority to implement the *Avena* judgment and that Congress has acquiesced in the exercise of such authority. The United States also relies upon an "independent" international dispute-resolution power wholly apart from the asserted authority based on the pertinent treaties. Medellin adds the additional argument that the President's Memorandum is a valid exercise of his power to take care that the laws be faithfully executed.

1

The United States maintains that the President's Memorandum is authorized by the Optional Protocol and the U. N. Charter. Brief for United States as *Amicus*

1

The United States maintains that the President's Memorandum is authorized by the Optional Protocol and the U. N. Charter. Brief for United States as *Amicus Curiae* 9. That is, because the relevant treaties "create an obligation to comply with *Avena*," they "*implicitly* give the President authority to implement that treaty-based obligation." *Id.*, at 11 (emphasis added). As a result, the President's Memorandum is well grounded in the first category of the *Youngstown* framework.

We disagree. The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. *Foster*, 2 Pet., at 315; *Whitney*, 124 U. S., at 194; *Igartúa-De La Rosa*, 417 F. 3d, at 150. As this Court has explained, when treaty stipulations are "not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Whitney*, *supra*, at 194. Moreover, "[u]ntil such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject." *Foster*, *supra*, at 315.

The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. The Constitution vests the President with the authority to "make" a treaty. Art. II, §2. If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented "in mak[ing]" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, *ibid.*, consis-

tent with all other constitutional restraints.

Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'" *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 591 (2006) (quoting *Ex parte Milligan*, 4 Wall. 2, 139 (1866) (opinion of Chase, C. J.)); see U. S. Const., Art. I, §1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"). As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, §7. Indeed, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U. S., at 587.

A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result. We therefore conclude, given the absence of congressional legislation, that the non-self-executing treaties at issue here did not "express[ly] or implied[ly]" vest the President with the unilateral authority to make them self-executing. See *id.*, at 635 (Jackson, J., concurring). Accordingly, the President's Memorandum does not fall within the first category of the *Youngstown* framework.

Indeed, the preceding discussion should make clear that the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally

make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so. When the President asserts the power to "enforce" a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second. See *id.*, at 637–638.

Each of the two means described above for giving domestic effect to an international treaty obligation under the Constitution—for making law—requires joint action by the Executive and Legislative Branches: The Senate can ratify a self-executing treaty "ma[de]" by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President. It should not be surprising that our Constitution does not contemplate vesting such power in the Executive alone. As Madison explained in The Federalist No. 47, under our constitutional system of checks and balances, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." J. Cooke ed., p. 326 (1961). That would, however, seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty.

The United States nonetheless maintains that the President's Memorandum should be given effect as domestic law because "this case involves a valid Presidential action in the context of Congressional 'acquiescence'." Brief for United States as *Amicus Curiae* 11, n. 2. Under the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President's action falls within the second category—that is, when he "acts in absence of either a congressional grant or denial of authority." 343 U. S., at 637 (Jackson, J., concurring). Here,

however, as we have explained, the President's effort to accord domestic effect to the *Avena* judgment does not meet that prerequisite.

In any event, even if we were persuaded that congressional acquiescence could support the President's asserted authority to create domestic law pursuant to a non-self-executing treaty, such acquiescence does not exist here. The United States first locates congressional acquiescence in Congress's failure to act following the President's resolution of prior ICJ controversies. A review of the Executive's actions in those prior cases, however, cannot support the claim that Congress acquiesced in this particular exercise of Presidential authority, for none of them remotely involved transforming an international obligation into domestic law and thereby displacing state law.[14]

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[14] Rather, in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U. S.*), 1986 I. C. J. 14 (Judgment of June 27), the President determined that the United States would *not* comply with the ICJ's conclusion that the United States owed reparations to Nicaragua. In the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Can. v. U. S.*), 1984 I. C. J. 246 (Judgment of Oct. 12), a federal agency—the National Oceanic and Atmospheric Administration—issued a final rule which complied with the ICJ's boundary determination. The *Case Concerning Rights of Nationals of the United States of America in Morocco* (*Fr. v. U. S.*), 1952 I. C. J. 176 (Judgment of Aug. 27), concerned the legal status of United States citizens living in Morocco; it was not enforced in United States courts.

The final two cases arose under the Vienna Convention. In the *Lagrand Case* (*F. R. G. v. U. S.*), 2001 I. C. J. 466 (Judgment of June 27), the ICJ ordered the review and reconsideration of convictions and sentences of German nationals denied consular notification. In response, the State Department sent letters to the States "encouraging" them to consider the Vienna Convention in the clemency process. Brief for United States as *Amicus Curiae* 20–21. Such encouragement did not give the ICJ judgment direct effect as domestic law; thus, it cannot serve as precedent for doing so in which Congress might be said to have acquiesced. In the *Case Concerning the Vienna Convention on Consular Relations* (*Para. v. U. S.*), 1998 I. C. J. 248 (Judgment of Apr. 9), the

The United States also directs us to the President's "related" statutory responsibilities and to his "established role" in litigating foreign policy concerns as support for the President's asserted authority to give the ICJ's decision in *Avena* the force of domestic law. Brief for United States as *Amicus Curiae* 16–19. Congress has indeed authorized the President to represent the United States before the United Nations, the ICJ, and the Security Council, 22 U. S. C. §287, but the authority of the President to represent the United States before such bodies speaks to the President's *international* responsibilities, not any unilateral authority to create domestic law. The authority expressly conferred by Congress in the international realm cannot be said to "invite" the Presidential action at issue here. See *Youngstown*, *supra*, at 637 (Jackson, J., concurring). At bottom, none of the sources of authority identified by the United States supports the President's claim that Congress has acquiesced in his asserted power to establish on his own federal law or to override state law.

None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. It is only to say that the Executive cannot unilaterally execute a non-self-

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ICJ issued a provisional order, directing the United States to "*take all measures at its disposal* to ensure that [Breard] is not executed pending the final decision in [the ICJ's] proceedings." *Breard*, 523 U. S., at 374 (internal quotation marks omitted). In response, the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution *Id.*, at 378. When Paraguay sought a stay of execution from this Court, the United States argued that it had taken every measure at its disposal: because "our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States," those measures included "only persuasion," not "legal compulsion." Brief for United States as *Amicus Curiae*, O. T. 1997, No. 97–8214, p 51 This of course is precedent contrary to the proposition asserted by the Solicitor General in this case.

executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to "establish binding rules of decision that preempt contrary state law." Brief for United States as *Amicus Curiae* 5.

2

We thus turn to the United States' claim that—independent of the United States' treaty obligations—the Memorandum is a valid exercise of the President's foreign affairs authority to resolve claims disputes with foreign nations. *Id.*, at 12–16. The United States relies on a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement. See *Garamendi*, 539 U. S., at 415; *Dames & Moore*, 453 U. S., at 679–680; *United States* v. *Pink*, 315 U. S. 203, 229 (1942); *United States* v. *Belmont*, 301 U. S. 324, 330 (1937). In these cases this Court has explained that, if pervasive enough, a history of congressional acquiescence can be treated as a "gloss on 'Executive Power' vested in the President by §1 of Art. II." *Dames & Moore*, *supra*, at 686 (some internal quotation marks omitted).

This argument is of a different nature than the one rejected above. Rather than relying on the United States' treaty obligations, the President relies on an independent source of authority in ordering Texas to put aside its procedural bar to successive habeas petitions. Nevertheless, we find that our claims-settlement cases do not support the authority that the President asserts in this case.

The claims-settlement cases involve a narrow set of

circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals. See, *e.g.*, *Belmont*, *supra*, at 327. They are based on the view that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," can "raise a presumption that the [action] had been [taken] in pursuance of its consent." *Dames & Moore*, *supra*, at 686 (some internal quotation marks omitted). As this Court explained in *Garamendi*,

> Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice . . . . Given the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable. 539 U. S., at 415 (internal quotation marks and brackets omitted).

Even still, the limitations on this source of executive power are clearly set forth and the Court has been careful to note that "[p]ast practice does not, by itself, create power." *Dames & Moore*, *supra*, at 686.

The President's Memorandum is not supported by a "particularly longstanding practice" of congressional acquiescence, see *Garamendi*, *supra*, at 415, but rather is what the United States itself has described as "unprecedented action," Brief for United States as *Amicus Curiae* in *Sanchez-Llamas*, O. T. 2005, Nos. 05–51 and 04–10566, pp. 29–30. Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally

applicable state laws. Cf. *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law" (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982); internal quotation marks omitted). The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.

3

Medellín argues that the President's Memorandum is a valid exercise of his "Take Care" power. Brief for Petitioner 28. The United States, however, does not rely upon the President's responsibility to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, §3. We think this a wise concession. This authority allows the President to execute the laws, not make them. For the reasons we have stated, the *Avena* judgment is not domestic law; accordingly, the President cannot rely on his Take Care powers here.

The judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

Brownstein | Hyatt Farber | Schreck

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Fax Cover Sheet

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EMBAJADA DE MÉXICO

Washington, DC
July 8, 2009

The Honorable Richard Lugar
Ranking Member
U.S. Senate Committee on Foreign Relations
Washington, DC 20510

Dear Senator Lugar,

I recently contacted Republican Leader Mitch McConnell to request his support so that Congress can enact legislation to give effect to the 2004 International Court of Justice's determination, known as the *Avena Judgment*, which provided for the review and reconsideration of the convictions and sentences of certain Mexican nationals incarcerated in the US, whose consular rights were violated.

I have attached herewith a copy of said letter for your review, and I would like to respectfully request your support as Ranking Member of the Foreign Relations Committee in assisting in this effort aimed at bringing the US into compliance with an undisputed International obligation, as recognized by the US Supreme Court in *Medellin v. Texas*, 552 U.S. _____ (2008).

I would like to take this opportunity to renew to you the assurances of my high esteem.

Sincerely,

Arturo Sarukhan
Ambassador of Mexico

EMBAJADA DE MÉXICO

Washington, DC
July 8, 2009

The Honorable Ileana Ros-Lehtinen
Ranking Member
U.S. House of Representatives Committee on Foreign Affairs
Washington, DC 20515

Dear Congresswoman Ros-Lehtinen,

I recently contacted Republican Leader John Boehner to request his support so that Congress can enact legislation to give effect to the 2004 International Court of Justice's determination, known as the *Avena Judgment*, which provided for the review and reconsideration of the convictions and sentences of certain Mexican nationals incarcerated in the US, whose consular rights were violated.

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Ambassador of Mexico

EMBAJADA DE MÉXICO

Washington, DC
July 7, 2009

The Honorable John Boehner
Republican Leader
U.S. House of Representatives
Washington, DC 20515

Dear Leader Boehner,

I write to share a serious concern that the Government of Mexico has regarding the United States' ongoing failure to meet its international legal obligation to remedy denials of prompt consular notification and access to arrested Mexican nationals as established under Article 36 of the Vienna Convention on Consular Relations (VCCR). Specifically, we are troubled by the failure to abide by the International Court of Justice's (ICJ) determination, known as the *Avena Judgment*, that the U.S. must provide review and reconsideration of the convictions and sentences of certain Mexican nationals, whose consular rights were violated.

The government of Mexico does not call into question the heinous nature of the crimes attributed to these defendants. However, the Avena judgment is about two fundamental principles: due process and due compliance with international law. As such, giving effect to it would also be a win-win for all, given that it would enable the US to ensure the safety of its nationals and interests abroad, by precluding other parties from invoking non-compliance as justification for ignoring their own international obligations.

As you know, the United States ratified the VCCR without reservations in 1969. Article 36 of this Convention requires signatory countries to provide detained foreign nationals with access to timely consular assistance, informing them "without delay" of their rights under Article 36, notifying the relevant consulate at the request of the detainee, and facilitating consular visits so that the consulate may assist foreign nationals with their legal representation. Moreover, in 1969 the U.S. voluntarily consented to the ICJ's compulsory jurisdiction to adjudge disputes regarding the interpretation or application of Article 36 when it ratified the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes.

The Government of Mexico acknowledges and appreciates the efforts of the US Executive Branch to comply with the *Avena* Judgment, mainly through the Memorandum issued on February 28, 2005, stating that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principals of comity." However, the U.S. Supreme Court, in *Medellin v. Texas*, 552 U.S. _____ (2008), held that the Executive did not have the authority to enforce ICJ decisions arising under the Optional Protocol domestically, as it was not a self-executing treaty. The Court further determined that the "responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." At the same time, the Supreme Court observed that the Executive's attempt to seek domestic implementation of *Avena* in order to "vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" was "plainly compelling".

Therefore, as only the United States Congress has the authority to give domestic effect to the ICJ's determination and in light of the forceful reasons for it to do so, the Government of Mexico respectfully requests your support so that Congress can enact legislation providing effective judicial "review and reconsideration," to determine in each case whether any of the Mexican nationals named in *Avena* suffered prejudice as a result of the failure of the detaining authorities to comply with their binding obligations under Article 36 of the VCCR.

The people of Mexico and the United States of America share a long history and a close bond. Today, our governments are working cooperatively more than ever before on critical issues of mutual interest, including curbing illegal drug and firearms trafficking and violence on our shared border. I have no doubt that if the US Congress were to act on this issue concerning Article 36 of the VCCR, it would not only comply with the Supreme Court's decision and lead the way to implementing Avena but it would send a clear message of the US commitment to fulfill its obligations as a key member of the international community.

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Ambassador of Mexico

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Washington, DC
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